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No. 1114

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In the Supreme Court of the United States

October Term, 1945

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THE CUDAHY PACKING COMPANY, A MAINE  
CORPORATION, PETITIONER

THE UNITED STATES OF AMERICA,

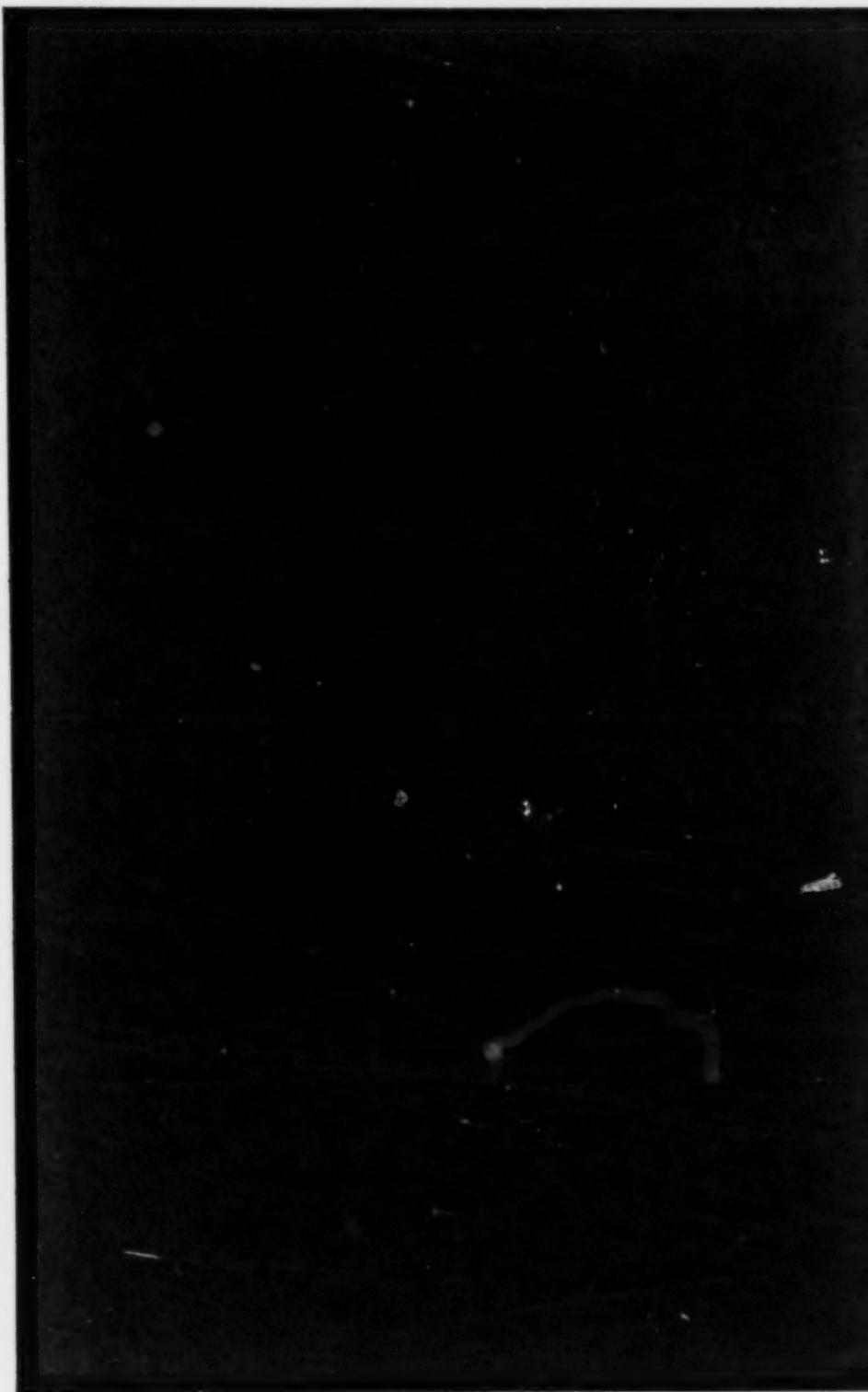
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH  
CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court on motion for summary judgment is reported in 37 F. Supp. 563 and the opinion of the Circuit Court of Appeals on appeal from that decision is reported in 126 F. 2d 429. The findings of fact and conclusions of law of the District Court (R. 471-473) are reported in 56 F. Supp. 753. The opinion of the Circuit Court of Appeals (R. 494-501) on appeal from the judgment thereupon entered is reported in 152 F. 2d 831. The opinion of the

Circuit Court of Appeals on petition for rehearing (R. 525-527) is not reported.

#### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 10, 1945. (R. 502.) A petition for rehearing was filed on December 26, 1945 (R. 502) and denied on January 15, 1946 (R. 527). The petition for a writ of certiorari was filed April 15, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

1. Whether the District Court was without jurisdiction in view of the fact that the taxpayer's claim for refund failed to comply with requirements of Section 903 of the Revenue Act of 1936, as amended.
2. Whether the taxpayer established, as required by Section 902 of the Revenue Act of 1936, that it bore the burden of the floor stocks taxes which it seeks to recover.

#### STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.—No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of

the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

\* \* \* \* \*

(7 U. S. C. 644.)

SEC. 903 [as amended by Section 405, Revenue Act of 1939, c. 247, 53 Stat. 862]. **FILING OF CLAIMS.**—No refund shall be made or allowed of any amount paid by or collected from any person as tax under the

Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C. 645.)

Treasury Regulations 96, promulgated under the Revenue Act of 1936:

**ARTICLE 202. FACTS AND EVIDENCE IN SUPPORT OF CLAIM.**—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.



**STATEMENT**

The complaint alleges (R. 3-20) payment by the taxpayer of floor stocks taxes under the Agricultural Adjustment Act in the sum of \$308,-182.08 (R. 5, par. 7); that the taxing provisions of the Agricultural Adjustment Act were unconstitutional and void (R. 16-17, par. 21); that the taxpayer filed a claim for refund on June 28, 1937 (R. 8, par. 15), which had not been acted upon by the Commissioner of Internal Revenue when this action was commenced; more than 18 months later (R. 8, par. 17); and that the taxpayer has not shifted the burden of the tax by billing any amount of it to any vendee as a separate item or by adding to or including in its prices any identifiable amount of the tax or by reducing the prices paid by it for raw materials (R. 16, par. 20).

Upon these allegations it is averred (R. 16-17, par. 21) that the taxpayer has not shifted the burden of the tax and that, if Section 902 of the Revenue Act of 1936 requires proof of facts other than those alleged, it violates the Fifth Amendment to the Constitution of the United States and is unconstitutional and void.

The Government's answer (R. 20-23) put in issue allegations with respect to the burden of the tax and impossibility of proof.

Upon a motion for summary judgment by the taxpayer, the District Court upheld the taxpayer's contention that Section 902 of the Rev-

enue Act of 1936 required proof of no facts beyond those alleged in the complaint and granted judgment in favor of the taxpayer. 37 Supp. 563.

This judgment was reversed by the Circuit Court of Appeals (126 F. 2d 429) which held that the statute required the taxpayer to establish that it had not shifted the economic burden of the tax and remanded the cause to the District Court for further proceedings. The taxpayer then amended its complaint (R. 47-48) to allege, in the language of the statute, that it had not shifted the burden of the tax sought to be recovered and, in the alternative (R. 48), "that the available facts relating to plaintiff's operations and course of business, full proof of which will be adduced on the trial of this cause, afford no basis for any determination as to the shifting of the burden of the tax." This allegation was later amended by the following addition (R. 51):

, and plaintiff further avers that, if said Section 902 is so construed or interpreted as to preclude recovery by the plaintiff notwithstanding such impossibility of determination after full proof of said facts has been made, then and in that case said Section 902 violates the Fifth Amendment of the Constitution of the United States and is unconstitutional and void in that it requires proof impossible for plaintiff to make and deprives plaintiff of its property without due process of law. In that case plaintiff is entitled to recover from defendant

ant the said principal amount of its claim with interest, under the provisions of said Sections 3770, 3771, and 3772 of I. R. C.

The answer was amended to meet the taxpayer's amendments (R. 49) and put in issue the allegations with respect to the burden of the tax and impossibility of proof.

After trial, the District Court found (R. 471-473) that the claim for refund was insufficient to support the jurisdiction of the District Court because it contained no evidence from which it could be determined that the taxpayer had borne the burden of the tax.

The District Court further found (R. 473) that the evidence introduced by the taxpayer upon the trial was insufficient to establish that it had borne the burden of the tax.

The Circuit Court of Appeals held (R. 494-501) that the decision of the District Court was correct on both points and affirmed.

#### ARGUMENT

1. Section 903 of the Revenue Act of 1936, as amended, *supra*, provides that no refund of any amount paid as tax under the Agricultural Adjustment Act shall be allowed unless a claim for refund is filed in which all evidence in support of the claim is clearly set forth under oath. The claim in this case (R. 24-45) merely stated that it could not be ascertained from the taxpayer's records whether or not it had shifted the burden

of the tax. Such statements have been held insufficient to meet the requirements of the statute. *18th Street Leader Stores v. United States*, 142 F. 2d 113 (C. C. A. 7th); *New York Handkerchief Mfg. Co. v. United States*, 142 F. 2d 111 (C. C. A. 7th); *Weiss v. United States*, 135 F. 2d 889 (C. C. A. 7th).

The taxpayer urges (Br. 21) that the infirmity of the claim, which it concedes (Br. 19), was waived by the Commissioner by examining the taxpayer's books and records. The claim for refund, however, was never rejected by the Commissioner and, as the Circuit Court of Appeals points out (R. 526), there is nothing to indicate that the Commissioner by investigating the taxpayer's books intended to waive the right to reject the claim for defects in form. This Court in *Angelus Milling Co. v. Commissioner*, 325 U. S. 293, held that evidence of such a waiver should clearly and unmistakably establish an intention on the part of the Commissioner to dispense with the formal requirements of the statute. The decision of the Circuit Court of Appeals, so far from being in conflict with that in the *Angelus Milling Co.* case, follows it. It correctly sustained the District Court's ruling that it was without jurisdiction.

2. The Circuit Court of Appeals also correctly decided that the District Court was right in dismissing the complaint for the taxpayer's failure of proof. It was for the taxpayer to establish to the satisfaction of the trial court that

it had borne the burden of the tax. (Section 902, Revenue Act of 1936, *supra*; *Webre Steib Co. v. Commissioner*, 324 U. S. 164, 171.

The record reveals that the market prices for hog products, at which the taxpayer sold its products, were increased upon the announcement of the imposition of the tax (R. 248-249) and that on the date the tax was imposed prices of all meat products were increased by at least the amount of the tax. In addition, the Government also proved (R. 366) that when the tax was imposed the taxpayer was able to reverse a normal seasonal decline in the sales value of its products to an extent greatly in excess of the amount of the floor stocks taxes paid by it and thus to shift the entire burden of the tax.

The District Court's finding that the evidence introduced by the taxpayer upon the trial was insufficient to establish that it had borne the burden of the tax was made after that court had weighed all the evidence. The Circuit Court of Appeals re-examined the evidence and found no error in the District Court's determination.

The decision of the Circuit Court of Appeals is not in conflict with *Webre Steib Co. v. Commissioner*, 324 U. S. 164, as the taxpayer asserts. (Pet. 14.) That case involved the presumption contained in Section 907 of the Revenue Act of 1936 with respect to refunds of processing taxes. There the proof only showed that the taxpayer had increased its prices at the incidence of the

tax; here, as pointed out above, the Government went further and established the fact that the taxpayer was enabled to reverse a normal seasonal decline in its prices and thus shift the entire tax burden.

Nor is the decision of the Circuit Court of Appeals in conflict with *United States v. Arkwright Mills*, 139 F. 2d 454 (C. C. A. 4th). In that case the taxpayer added the tax to its prices and compared its actual selling prices to those thus established. From its failure to obtain these prices thus increased, the taxpayer argued that it had to this extent borne the burden of the tax. The Government offered no proof, as here, and the court held that the *prima facie* case made out by the taxpayer had not been rebutted.

#### CONCLUSION

The decision of the Circuit Court of Appeals was correct and there is no conflict between it and the decisions of this Court or of any Circuit Court of Appeals. The petition for certiorari should therefore be denied.

Respectfully submitted.

J. HOWARD MCGRATH,  
*Solicitor General.*

SEWALL KEY,  
*Acting Assistant Attorney General.*

ROBERT N. ANDERSON,

FREDERIC G. RITA,

*Special Assistants to the Attorney General.*

MAY 1946.

*End*

